Supreme Court, U.S.
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No. 09-187

In The

Supreme Court of the United States

VALINDA JO ELLIOTT,

Petitioner,

vs.

WHITE MOUNTAIN APACHE TRIBAL COURT; HONORABLE JOHN DOE TRIBAL JUDGE; AND WHITE MOUNTAIN APACHE TRIBE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Tribal courts are not courts of general jurisdiction. A tribal court's civil jurisdiction over non-consenting non-Indian defendants is limited to the two specific exceptions to the general rule established in *Montana v. United States*, 450 U.S. 544, 565–566 (1981), which created a presumption against tribal court jurisdiction over nonmembers. Thus, where a tribal court is attempting to broaden the scope of its own jurisdiction in violation of United States Supreme Court precedent, and where jurisdiction plainly does not exist, a non-consenting non-Indian cannot be forced to defend a civil case on the merits in that unfamiliar tribal court before bringing her claim of lack of jurisdiction to the federal courts.

One question is presented:

Can a tribal court assert jurisdiction over a non-consenting non-Indian and force her to defend against civil claims in that unfamiliar forum when it is plain that the tribal court has neither regulatory nor adjudicatory jurisdiction and where the conduct at issue by the non-consenting non-Indian on tribal land does not and cannot ever threaten or directly effect the tribal political integrity, economic security, or the health or welfare of the tribe?

LIST OF PARTIES

The parties below are listed in the caption. In addition, the Inter Tribal Council of Arizona, Inc., appeared as *amicus curiae* in support of Respondents the White Mountain Apache Tribal Court and the White Mountain Apache Tribe.

CORPORATE DISCLOSURE STATEMENT

Valinda Jo Elliott is an individual non-consenting non-Indian, and is not subject to the corporate disclosure requirement.

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OPINION BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit was issued on May 14, 2009, and is reported at 566 F.3d 842 (9th Cir., 2009).

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The basis for the District Court's and the Ninth Circuit Court's subject matter jurisdiction is federal question jurisdiction. *See* 28 U.S.C. § 1331; *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852-53, 105 S.Ct. 2447 (1985); *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1130 (9th Cir., 2006). Venue was proper in the Arizona District Court pursuant to 28 U.S.C. § 1391(e).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a question of federal common law and does not require resolution of a problem with a specific constitutional or statutory provision.

STATEMENT OF THE CASE

On June 11, 2003, the White Mountain Apache Tribe instituted Tribal Civil Action #C-03-97, against Valinda Jo Elliott, a non-Indian, alleging claims for

relief resulting from a fire Ms. Elliott started on tribal lands that ultimately caused substantial damage to property within the boundaries of the White Mountain Apache Tribe reservation as it raged out of control during the months of June and July 2002. Ms. Elliott filed a Motion to Dismiss based on lack of jurisdiction since the Tribal Court clearly did not have civil jurisdiction over her, a non-consenting non-Indian, and since neither of the two very limited exceptions contemplated under *Montana v. United States*, 450 U.S. 544, 565-66, 101 S.Ct. 1245 (1981), and further discussed in *Nevada v. Hicks*, 533 U.S. 353, 369, 121 S.Ct. 2304 (2001), was applicable.

On December 18, 2003, the Tribal Court issued a ruling denying Ms. Elliott's Motion to Dismiss. (App. 39.) In the ruling, the Tribal Court, stated that *Montana* and *Nevada*, were satisfied and that jurisdiction was proper. (App. 41.) The ruling indicated that Ms. Elliott's "conduct" on "*Nn'dee Bi-Kee Yuh*" land was sufficient to establish Tribal jurisdiction. (App. 41.) The court also relied on the fact that the "conduct" violated White Mountain Apache Law, and the Apache standard of "*C'hinl-seeh Hoz-unh*," further supporting a finding of tribal jurisdiction. (App. 41.)

Ms. Elliott immediately filed an appeal in the White Mountain Apache Court of Appeals, which was pending for over a year. Then, in April of 2005, the appeal was dismissed. (App. 43.) The appellate court accepted jurisdiction to review the Petition, but found that, under tribal law, no "interlocutory appeals with regard to motions to dismiss for lack of jurisdiction"

are allowed. (App. 46.) The court then noted the differences between tribal law and the law of other jurisdictions, like Arizona, and found that the appellate court lacked jurisdiction under tribal law to consider the denial of the Motion to Dismiss. (App. 44-45.) The court, therefore, returned the matter to the Tribal Court, and lower court pre-trial proceedings continued through the Fall of 2005.

The federal case was commenced in the Federal District Court for the District of Arizona in December of 2005 when Ms. Elliott filed a Complaint for declaratory and injunctive relief against the Tribe in the form of an injunction against further prosecution of a civil action in the Tribal Court due to the Tribal Court's complete lack of jurisdiction over her as a non-consenting non-Indian. Valinda Jo Elliott argued in the District Court first, that exhaustion was not required in tribal court, second, that she had exhausted her jurisdictional claim in tribal court, to the extent such exhaustion was necessary, and third, that her circumstances established several of the exceptions to the exhaustion doctrine. Most importantly, Valinda Jo Elliott alerted the District Court that tribal court jurisdiction plainly did not exist pursuant to *Montana*.

The White Mountain Apache Tribe filed a Motion to Dismiss, and the District Court granted that Motion finding that Ms. Elliott had not fully exhausted her jurisdictional argument in Tribal Court, that such exhaustion was necessary, and that none of the exceptions to the exhaustion requirement

were satisfied. The District Court entered its Order on December 7, 2006. (App. 19.)

On December 31, 2006, Valinda Jo Elliott filed a Notice of Appeal, which was timely pursuant to Federal Rule of Appellate Procedure 4. Following full briefing and oral argument, the Ninth Circuit issued its Opinion affirming the District Court's decision. (App. 1.)

The Ninth Circuit Court of Appeals made several findings that Ms. Elliott is not requesting this Court to review. Ms. Elliott is not contending that there was any error in the finding that the District Court Order was a final Order for purposes of appeal and pursuant to 28 U.S.C. § 1291. She is also not requesting review of the determination that the first three exceptions to the exhaustion doctrine do not apply. Valinda Jo Elliott is instead only requesting review and challenging the decision of the issue raised herein in the question presented involving the Ninth Circuit's finding of a colorable claim of jurisdiction in the tribal court based on the second exception to *Montana*'s main rule. The Ninth Circuit issued its Opinion on May 14, 2009.

REASONS FOR ALLOWANCE OF THE WRIT

I. The Ninth Circuit has decided an important federal question in a way that conflicts with this Court's precedent in *Nevada v. Hicks*, 533 U.S. 353, 121 S.Ct. 2304 (2001) and *Montana v. United States*, 450 U.S. 544, 565-566, 101 S.Ct. 1245 (1981).

In *Nevada v. Hicks*, 533 U.S. 353, 369, 121 S.Ct. 2304, 2315 (2001), this Court explicitly disposed of the assertion that non-member petitioners were required to fully exhaust their jurisdictional claims in Tribal Court before bringing them in Federal District Court. In fact, this Court has repeatedly noted that tribal exhaustion is first and foremost a prudential nonjurisdictional rule and not a jurisdictional requirement. *See Strate v. A-1 Contractors*, 520 U.S. 438, 453, 117 S.Ct. 1404 (1997); *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 20, n.4, 107 S.Ct. 971 (1987); *National Farmers Union Ins. Cos. v. Crow*, 471 U.S. 845, 856, 105 S.Ct. 2447 (1985). Thus, federal courts should, *not must*, as a matter of comity, afford tribal courts the first opportunity to determine whether or not jurisdiction exists. *Nevada*, 533 U.S. at 368-69; *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142, 100 S.Ct. 2578 (1980).

In *Nevada*, this Court went on to establish that, where it is plain that jurisdiction does not exist, exhaustion of the jurisdictional claim in tribal court is not necessary. *See Nevada*, 533 U.S. at 369; *Strate*, 520 U.S. at 449 (suggesting intervention is

appropriate where cause for immediate federal court action exists).

Here, the Ninth Circuit, citing its own precedent in *Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 948 (9th Cir., 2008), instead found that exhaustion is *required*, when tribal court jurisdiction is merely *plausible*. (App. 11.) The Ninth Circuit explicitly found that where jurisdiction is plausible or colorable the exception established by this Court in *Nevada* and *Strate*, does not apply. (App. 11.) And, although the Ninth Circuit has equated the inquiry into whether jurisdiction is plain with the question of whether it is plausible or colorable, the inquiry is not the same. *See Allstate Indem. Co. v. Stump*, 191 F.3d 1071, 1075-76 (9th Cir., 1999). In fact, the Ninth Circuit's decision conflicts with *Nevada*, because the court refused to apply this Court's exception to the exhaustion doctrine based, not on the analysis expressly discussed in *Nevada*, but instead on its own asserted analysis regarding whether there is a colorable claim of jurisdiction. *See Nevada*, 533 U.S. 353, 358, n.2; *Strate*, 520 U.S. at 459-60 & n.14, 105 S.Ct. 2106. The burden is not on the non-consenting non-Indian to establish that the Tribe does not have a colorable claim. The law is clear that the Tribal government has no jurisdiction over non-consenting non-Indians unless and until the White Mountain Apache Tribe affirmatively establishes one of the exceptions pursuant to *Montana*. *Nevada*, 533 U.S. at 369; *Strate*, 520 U.S. at 449. As discussed hereinafter, neither of the exceptions to *Montana* apply in this

case. Thus, the Ninth Circuit's Opinion must be reviewed and corrected in order to conform to this Court's precedent in both *Nevada* and *Montana*.

II. The Ninth Circuit has published an Opinion wrongly deciding an important question of federal law that has not been, but should be, settled by this Court.

To the extent the Ninth Circuit's Opinion does not directly conflict with this Court's precedent, it must be reviewed by this Court as the Ninth Circuit has gone beyond the ruling in *Montana* and wrongly decided the question of whether tribes may exercise civil jurisdiction over non-consenting non-member civil defendants. This question has been explicitly left open by this Court in both *Nevada* and *Montana*, and it must now be answered. Otherwise, defendants like Valinda Jo Elliott will continue to be hailed into tribal court against their will and forced to endure a costly litigation and suffer a tribal civil ruling before ever having the opportunity to remove the case to federal court jurisdiction where it belongs. The lingering confusion in tribal and federal courts resulting in the improper exercise of tribal jurisdiction over non-consenting non-Indians must be stopped.

The Ninth Circuit especially erred in making its ruling, because it allowed the status of the land to be dispositive and because it found the second exception to *Montana* based on the amount of damage to the land, where neither of these findings are supported

by this Court's law. The Ninth Circuit has improperly expanded tribal jurisdiction beyond that supported or even contemplated by this Court's authority.

A. *Montana*'s main rule clearly establishes a presumption of lack of jurisdiction and that rule must be explicitly applied to cases involving non-consenting non-Indian defendants.

The Ninth Circuit noted in its opinion that the question of jurisdiction over a non-member defendant in tribal court is "murkier" than other jurisdictional questions. (App. 11.) This is only arguably so, because of the continuing problem that the specific question raised in this case has yet to be answered by this Court. What is clear, however, is that the "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565. Yet here, the Ninth Circuit has nonetheless issued an Opinion that finds jurisdiction where it simply does not exist and where this Court must certainly find to the contrary.

The questions regarding tribal jurisdiction over non-Indians have plagued this Court and others for many years, and have culminated in a few set principles, all of which indicate the direction this Court must move in establishing the rule regarding lack of jurisdiction in tribal courts over non-consenting non-Indians.

In *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 98 S.Ct. 1011 (1978), this Court held that tribes lack criminal jurisdiction over non-Indians. *See also Duro v. Reina*, 495 U.S. 676, 684-85, 110 S.Ct. 2053 (1990) (no criminal jurisdiction over non-member Indians). The reason this is so turns on an analysis of tribal "status" and also encompasses the fact that tribes are discrete or sovereign communities within states but outside state law, so that their laws do not necessarily provide adequate protections to non-Indians.

Thereafter, in *National Farmers Union Ins. Cos. v. Crow*, the Court noted that the decision in *Oliphant* relied largely on federal preemption (which does not necessarily exist in civil situations), causing differences between the determination of criminal jurisdiction and civil jurisdiction. 471 U.S. at 854. The Court concluded:

> . . . that the answer to the question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians in a case of this kind is not automatically foreclosed, as an extension of Oliphant would require. Rather, the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.

National Farmers, 471 U.S. at 855-56 (footnotes omitted).

Then, in *Montana*, this Court determined that tribes do not have authority "independently to determine their external relations." *Montana*, 450 U.S. at 564. This Court held that the "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565. The powers retained by tribes involve self-government and relations among tribe members. *Montana*, 450 U.S. at 564. Thus, this Court found that tribes do not have civil jurisdiction over non-Indians absent two very limited circumstances. *Id.*

The first exception allows that a tribe may exercise civil jurisdiction over a non-Indian who has entered a consensual business relationship with the tribe. *Nevada*, 533 U.S. at 371. The second exception allows that a tribe may exercise civil jurisdiction over a non-Indian where the conduct of the non-member non-Indian threatens or has some direct effect on the political integrity, economic security or health or welfare of the tribe. *Id.*

In discussing the two limited exceptions to *Montana*'s general rule of non-jurisdiction, this Court noted that "[w]here nonmembers are concerned, the 'exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependant status of the tribes, and so cannot survive without express

congressional delegation.'" *Nevada*, 533 U.S. at 360. In fact, in *Nevada*, the Court recognized that it has "never held that a tribal court had jurisdiction over a nonmember defendant." 533 U.S. at 358, n.2; *see also Smith*, 434 F.3d at 1132 (noting that the Court has never held that a tribe has jurisdiction over a non-member defendant in a civil case, regardless of whether the claims arose on Indian land).

Then, in *Strate v. A-1 Contractors*, the Court noted that its precedent establishes that "absent express authorization by federal statute or treaty tribal jurisdiction over the conduct of non-members exists only in limited circumstances." 520 U.S. at 445.

Thus, after *Montana* and its progeny, it is clear that the presumption is that tribes do not have jurisdiction over non-Indians unless one of the two specific exceptions contemplated by *Montana* is established. *Strate*, 520 U.S. at 456; *Nevada*, 533 U.S. at 376 (Souter, J., concurring). It is also clear that these two exceptions exist only within the context of the tribe's ability to self-govern and/or to control internal relations. *Id.* Otherwise, if the analysis is taken out of the context of the realm of self-government and management of internal relations, any activity could be broadly construed to "impact" the "economy" or "welfare" of the tribe. This is exactly what the Ninth Circuit has done in this case, and why this Court must review the matter and issue a final decision that settles the question once and for all.

B. The Ninth Circuit's Opinion improperly decided the question of tribal jurisdiction over non-consenting non-Indians based on the second exception to *Montana*'s main rule and must be reviewed by this Court in order to establish that tribal sovereignty does not include jurisdiction over non-consenting non-Indian defendants.

In this case, there has never been a consensual business relationship between Ms. Elliott and the White Mountain Apache Tribe, nor was one ever alleged prior to the Ninth Circuit, and thus, as the District Court properly determined, the first exception to *Montana* is clearly inapplicable.

The Tribe continues to assert, and the lower federal courts determined, however, that the basis of the Tribal Court's jurisdiction is found within the second exception to *Montana* and involves the Tribe's inherent sovereignty. (App. 15-17, 30.) The Ninth Circuit has thus broadly and improperly construed the second exception to allow civil jurisdiction in favor of the Tribe when the law that exists on the issue clearly points to a contrary conclusion. An individual non-consenting non-Indian could never engage in any conduct on tribal land that impacts the political integrity, economic security or health or welfare of the tribe in the manner contemplated by this Court in *Montana*.

This Court has provided numerous examples of what acts fall within the ambit of the second

exception. The examples include matters such as adoption, *Fisher v. District Court*, 424 U.S. 382, 96 S.Ct. 943 (1976), suits by non-Indians against an Indian in a state court when the incident took place on a reservation, *Williams v. Lee,* 358 U.S. 217, 79 S.Ct. 269 (1959), and taxation, *Montana Catholic Missions v. Missoula County*, 200 U.S. 118, 26 S.Ct. 197 (1906) and *Thomas v. Gay,* 169 U.S. 264, 18 S.Ct. 340 (1898). In *Strate*, the Court also recognized that the cases referenced in *Montana* itself regarding the second exception, involved only those issues of a "question whether a State's (or Territory's) exercise of authority would trench unduly on tribal self-government." 520 U.S. at 457-58. The Court has also discussed the fact that self-government implicitly means involvement in the political process. *See Williams v. Lee,* 358 U.S. at 220-21. This insight clarifies the second exception greatly, as it is impossible for an individual non-Indian's activities to ever directly affect the purely internal activities of a tribe with regard to self-government, because that non-Indian could not, for example, order an Indian to state court or tax the tribe in the manner a state could. Tribal self-government is the crux of the second exception.

Ms. Elliott's case does not involve or disrupt membership, inheritance, adoption, government generally or taxation, so jurisdiction is not established. Ms. Elliott's actions of wandering onto Tribal land and starting a signal fire form the total basis for the assertion of jurisdiction. Under no circumstances,

however, could this conduct ever logically support a finding of the type of "impact" to the self-government and internal relations of the Tribe as discussed by *Montana*. No matter how much damage a trespassing non-Indian causes to tribal land, that action in no way touches on tribal self-government. Nor does it touch on tribal sovereignty. As discussed in *Strate*, "[u]ndoubtedly, those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if *Montana*'s second exception requires no more, the exception would severely shrink the rule." 520 U.S. at 457-58. Here, the Ninth Circuit has issued a decision that allows the exception to shrink the rule, and it cannot be allowed to remain as federal precedent.

The White Mountain Apache Tribe argued below, and the Ninth Circuit implicitly agreed, that the action against Ms. Elliott cannot be distinguished from the Tribe's inherent power to license and regulate hunting and fishing type activities on Tribal land. (App. 13.) There is a critical distinction, however, between licensing and regulation of non-Indian activities on trust lands and in forests on those lands, and civil suits brought by tribes in tribal court against non-consenting non-Indians. The White Mountain Apache Tribe has the ability to regulate its land, and it has the ability to exclude non-Indians from its land, but it has no ability to hail non-consenting non-Indians into tribal court.

Ms. Elliott's action of trespassing onto Tribal property without authority to do so and causing damage thereon is an activity that would allow Tribal jurisdiction in limitless cases over non-Indians if the Ninth Circuit's Opinion is sustained. But, when the Court decided *Montana*, it made clear that the *presumption* is that tribes do not have jurisdiction over non-Indians. 450 U.S. at 565. Just like States that are faced with Indians who commit wrongs outside of the reservation, the proper forum for hailing a violator into court is to hail her into court in the federal system. *See* 28 U.S.C. §§ 1331, 1332; *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 126 S.Ct. 676, 679 (2005); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49, 93 S.Ct. 1267 (1973); *Tenneco Oil Co. v. Sac and Fox Tribe of Indians of Oklahoma*, 725 F.2d 572 (10th Cir., 1984) ("When directed against non-Indians, assertion of Indian sovereignty is circumvented and defined by federal law, and thus, federal question is raised by the attempt to exercise such sovereignty, thus establishing basis for federal jurisdiction."); *Richmond v. Wampanoag Tribal Court Cases*, 431 F.Supp.2d 1159, 1178 (D. Utah, 2006). Ms. Elliott did not choose to purchase a permit or license to enjoy the benefits of the Reservation. By failing to do so, she manifested her absolute lack of any consent to tribal jurisdiction over her. Whether her actions of entering the reservation and starting a signal fire thereon were appropriate or not and whether they mandate that she be held civilly liable is a question to be

adjudicated in the federal court, not in the tribal court.

The Ninth Circuit based its finding on the Tribe's "strong interest in enforcing its regulations governing trespass, prevention of forest fires, and preservation of its natural resources." (App. 17.) The Ninth Circuit fails to recognize that Ms. Elliott's alleged conduct does not in any way alter the Tribe's ability to create and/or enforce its regulations, prevent forest fires, or preserve natural resources. Ms. Elliott did not, and could not ever prevent the Tribe from establishing and creating its own internal regulations. Nor is there any allegation that her conduct somehow touches on the Tribe's ability to self-govern. To find otherwise is to blatantly ignore the critical distinction between the power to regulate and exclude and the affirmative power of reaching out and exercising jurisdiction in Tribal Court over someone who has by no means asked to be licensed or regulated and who has not agreed to any exercise of Tribal authority over her.

Tribal dominion and control over its members and its own government does not equate to reaching out and exercising dominion and control over non-consenting non-Indian defendants for purposes of imposing its own codes of conduct and civil liability upon that person. Nothing in the history of Tribal sovereignty suggests that the United States Supreme Court has contemplated Tribes reaching out and broadening their jurisdiction in the manner allowed in this case.

The Ninth Circuit made another incorrect step in logic when it discussed the ownership status of the land. (App. 13.) This Court has stated that "[t]he ownership status of land . . . is only one factor to consider in determining whether regulation of the activities of nonmembers is 'necessary to protect tribal self-government or to control internal relations.'" *Nevada*, 533 U.S. at 360. Here, the Ninth Circuit and the Tribal Court both treated that status as dispositive, when it certainly is not. (App. 14.)

The Ninth Circuit even recognized that this Court has never held that a tribe has jurisdiction over a non-member defendant in a civil case, regardless of whether the claims arose on Indian land, yet it went on to find exactly that in Valinda Jo Elliott's case. (App. 14-15.) *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1132 (9th Cir., 2006) (noting that the Court has never held that a tribe has jurisdiction over a non-member defendant in a civil case, regardless of whether the claims arose on Indian land). The Ninth Circuit found jurisdiction, nonetheless, because the case involves "the destruction of millions of dollars of the tribe's natural resources." (App. 17.) That significant portions of tribal land were damaged, however, does not alter the jurisdictional analysis. Resulting damages to tribal property alone, no matter how high, can *never* establish the second exception to *Montana* and thereby provide the Tribe with jurisdiction. 450 U.S. at 565. This Court recognized in *Strate*, that there was a flaw in that type of argument and pointed out that the Court read its "precedent differently." 520 U.S. at 448. What the Ninth Circuit

did here, was what this Court warned about in *Strate*: it read the second exception in "isolation," which caused a misperception about whether the second exception applies. *Strate*, 520 U.S. at 459.

To the extent this Court has hinted that the land status could be dispositive, that is only true if the status of the land is dispositive in precluding tribal court jurisdiction. Precedent establishes instead that the analysis turns on Ms. Elliott's status as the *defendant* in a civil action in Tribal Court and *as a non-Indian* who has *not consented* to jurisdiction in that court. *See Smith*, 434 F.3d at 1131. As Justice Souter observed in his concurrence in *Nevada*, "[i]t is the membership status of the unconsenting party, not the status of real property, that counts as the primary jurisdictional fact." 533 U.S. at 382 (Souter, J., concurring); *Smith*, 434 F.3d at 1131. And, as the Supreme Court has further noted, "[r]ead in isolation, the *Montana* rule's second exception can be misperceived." *Strate*, 520 U.S. at 459. The courts throughout the country need explicit law from this Court establishing that fact once and for all, so that no further misperceptions occur. Tribal court jurisdiction plainly does not lie over a non-consenting non-Indian defendant.

The Supreme Court's concern has always been that non-Indians not be forced to defend themselves in unfamiliar courts for what would otherwise be an ordinary claim. *Strate*, 520 U.S. at 459; *Smith*, 434 F.3d at 1131. This is exactly the problem in this case. How can a non-Indian such as Ms. Elliott, ever

defend, for example, against the Apache concept of "*C'hinl-seeh Hoz-unh*" in an unfamiliar forum where there is no federal requirement that the United States Constitution be followed, and in front of a jury made up only of members of the Tribe to which she has caused so much damage? The answer is quite simply that she cannot defend in such a forum.

The Ninth Circuit has now expanded Supreme Court precedent and effectively obliterated the very limited exception to *Montana*, by establishing a rule that allows non-consenting non-Indian defendants to be hailed into tribal court based on nothing other than the status of the land. (App. 18.) But while the Tribe certainly can exclude Ms. Elliott from Tribal land (escort her off the reservation), the Tribe clearly has neither regulatory nor adjudicatory jurisdiction over Ms. Elliott. *See Williams v. Lee*, 358 U.S. at 220; *United States v. Mazurie*, 419 U.S. 544, 557, 95 S.Ct. 710 (1975). *Oliphant* and all the cases that follow explain that the Tribes cannot exercise any powers inconsistent with their status. *See Montana*, 450 U.S. at 556; *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144, 102 S.Ct. 894 (1982); *Oliphant*, 435 U.S. at 191. In other words, the Tribe can make laws and rules, such as "*C'hinl-seeh Hoz-unh*" for itself and its members, but it cannot assert those laws over non-Indians, such as Ms. Elliott in a civil suit in Tribal Court.

What the Ninth Circuit failed to do in issuing its Opinion, and what this Court must do in order to establish the correct analysis once and for all is to

look instead to the cases cited in *Montana* as they "indicate the character of the tribal interest the Court envisioned." 520 U.S. at 457-58, 117 S.Ct. at 1415. It is only when the activity alleged somehow effects the sovereignty and self-government of the tribe that tribal jurisdiction is appropriate. *See Strate*, 520 U.S. at 457 (accident tort); *Burlington Railroad v. Crow Tribe*, 196 F.3d 1059, 1062-63 (9th Cir., 2000) (train accident); *County of Lewis v. Allen*, 163 F.3d 509, 513-14 (9th Cir., 1998) (tort action involving a law enforcement officer); *Wilson v. Marchington*, 127 F.3d 805, 813-14 (9th Cir., 1997) (accident tort); *Louis v. United States*, 967 F.Supp. 456, 459-60 (Dist. N.M., 1997) (medical negligence resulting in death in a hospital on reservation). There is simply no question here that jurisdiction is appropriate. It clearly is not.

This Court needs a bright line rule that forecloses the problems inherent in "frequently" being "required to decide questions concerning the extent to which Indian tribes have retained the power to regulate the affairs of non-Indians." *National Farmers*, 471 U.S. 845, 851 (1985). The *Montana* rule is a generally applicable rule establishing the lack of jurisdiction, but it left open the question of jurisdiction over defendants such as Valinda Jo Elliott. Thus, tribal courts are continuing to exercise jurisdiction over non-consenting non-Indian defendants and federal courts are continuing to allow jurisdiction in tribal court, based on individual case review and inconsistent analysis, and because there is no definitive answer by this Court to the specific

question relating to non-consensual non-Indian defendants. However, when the tribe and the defendant have no consensual relationship and where the exercise of jurisdiction is in no way necessary to preserve tribal sovereignty, the lower federal courts and tribal courts must be clearly informed that tribal courts plainly do not have jurisdiction.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully Submitted,

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APPENDIX A

566 F.3d 842

United States Court of Appeals,
Ninth Circuit.
Valinda Jo ELLIOTT, Plaintiff-Appellant,
v.
WHITE MOUNTAIN APACHE TRIBAL COURT; Honorable John Doe Tribal Judge; and White Opinion Mountain Apache Tribe, Defendants-Appellees.
No. 07-15041.

Argued Oct. 22, 2008.
Resubmitted May 7, 2009.
Filed May 14, 2009.

Cari M. McConeghy-Harris, Law Offices of David Michael Cantor, P.C., Tempe, AZ, for the plaintiff-appellant.

Robert C. Brauchi, Tucson, AZ, and Alexander B. Ritchie, White Mountain Apache Tribe, Whiteriver, AZ, Howard M. Shanker and Laura Berglan, The Shanker Law Firm, PLC, Flagstaff, AZ, for the defendants-appellees.

Joe B. Sparks, The Sparks Law Firm, P.C., Scottsdale, AZ, for the amicus curiae.

Appeal from the United States District Court for the District of Arizona, Mary H. Murguia, District Judge, Presiding. D.C. No. CV-05-04240-MHM.

Before: SIDNEY R. THOMAS and SUSAN P. GRABER, Circuit Judges, and STEPHEN G. LARSON,* District Judge.

GRABER, Circuit Judge:

A tribal court's jurisdiction over nonmembers of the tribe is limited. As a matter of comity, however, federal courts generally decline to entertain challenges to a tribal court's jurisdiction until the tribal court has had a full opportunity to rule on its own jurisdiction. Finding that no exception to that general rule applies here, the district court held that exhaustion of tribal court remedies is required. On de novo review, *Boozer v. Wilder,* 381 F.3d 931, 934 (9th Cir.2004), we affirm.

FACTUAL AND PROCEDURAL HISTORY

In June 2002, Plaintiff Valinda Jo Elliott, a non-Indian, was riding in a private vehicle with her employer in the high desert of Arizona, in an area located within the borders of the White Mountain Apache Tribe's reservation. They got lost and ran out of fuel. Unadvisedly, they split up to search for help. Forest rangers rescued Plaintiff's employer but could not locate Plaintiff. For three days, she remained lost and without food, water, or proper clothing.

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* The Honorable Stephen G. Larson, United States District Judge for the Central District of California, sitting by designation.

In her wanderings, Plaintiff saw a forest fire in the distance. On the third day, she spotted a news helicopter recording the fire, which had been named the Rodeo fire. In an understandable effort to attract the helicopter occupants' attention, Plaintiff set a small signal fire.

Fortunately, her idea worked; the helicopter descended and rescued Plaintiff. Unfortunately, her signal fire grew into a substantial forest fire, which was named the Chediski fire. That fire eventually merged with the Rodeo fire and was dubbed, naturally, the Rodeo-Chediski fire. The combined fire burned more than 400,000 acres of land and caused millions of dollars in damage.

The United States Attorney's Office did not prosecute Plaintiff.[1] The tribe, however, brought a civil action against Plaintiff in tribal court, seeking civil penalties and an order of restitution. The tribe brought eight claims against Plaintiff, alleging violations of tribal executive orders, the tribal game and fish code, the tribal natural resource code, and common law negligence and trespass.[2] Plaintiff (the defendant in that action) filed a motion to dismiss for

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[1] The United States Attorney's Office did prosecute Leonard Gregg, a part-time forest fire fighter who set the Rodeo fire in an effort to seek work. He was convicted of arson, sentenced to 120 months of imprisonment, and ordered to pay more than $27 million in restitution.

[2] For simplicity, we refer to these sources of tribal law collectively as "tribal regulations."

lack of jurisdiction. The tribal trial court denied the motion, holding that it had jurisdiction under the relevant United States Supreme Court cases.

Plaintiff sought interlocutory appellate review of that decision in the tribal appellate court, but the tribal appellate court issued an order denying Plaintiff's request for appellate review. The tribal appellate court held that, under its rules of appellate procedure as promulgated by the tribal legislature, it cannot entertain interlocutory appeals. It therefore dismissed the appeal from a nonfinal order for lack of appellate jurisdiction and returned the case to the tribal trial court for further proceedings.

Plaintiff then brought this action in federal district court. Plaintiff seeks injunctive and declaratory relief against Defendants White Mountain Apache Tribe, Honorable John Doe Tribal Judge, and White Mountain Apache Tribal Court, and from conducting any further proceedings in tribal court. The district court held that Plaintiff must exhaust her tribal court remedies and granted Defendants' motion to dismiss. The district court dismissed the action without prejudice to its refiling after Plaintiff has exhausted her tribal court remedies. Plaintiff timely appeals.

DISCUSSION

A. *Appellate Jurisdiction*

We have appellate jurisdiction pursuant to 28 U.S.C. § 1291 over the district court's final decision

that Plaintiff must exhaust her tribal court remedies before refiling. Defendants argue that the district court's order and subsequent judgment are not "final" for purposes of § 1291 because those documents state that the action is dismissed "without prejudice." According to Defendants, the present decision is not "final" because Plaintiff eventually could refile after exhausting her tribal court remedies. We reject Defendants' hypertechnical reading of § 1291.

The Supreme Court has explained that its

> cases long have recognized that whether a ruling is "final" within the meaning of § 1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the "twilight zone" of finality. Because of this difficulty this Court has held that the requirement of finality is to be given a "practical rather than a technical construction."[3]

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[3] A search for a blanket rule among our own cases on whether dismissals without prejudice are "final" leads one into this "twilight zone," as we have given conclusory and somewhat contradictory statements on the subject. *Compare, e.g., Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1085 (9th Cir.2003) ("A dismissal of an action without prejudice is a final appealable order."), *with Wakefield v. Thompson*, 177 F.3d 1160, 1162 (9th Cir.1999) ("Although there are exceptions to the rule, dismissals with prejudice generally constitute final orders, while dismissals without prejudice generally do not.").

Gillespie v. U.S. Steel Corp., 379 U.S. 148, 152, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949)). In turn, we have given the following practical construction: "A ruling is final for purposes of § 1291 if it (1) is a full adjudication of the issues, and (2) clearly evidences the judge's intention that it be the court's final act in the matter." *Nat'l Distribution Agency v. Nationwide Mut. Ins. Co.*, 117 F.3d 432, 433 (9th Cir.1997) (internal quotation marks omitted).

We have no trouble concluding that the district court intended that the order be the court's final act in the matter. In *National Distribution Agency,* we expressed frustration with divining a court's intent from ambiguous orders and offered a practical suggestion: "Had the court entered a separate final judgment subsequent to the dismissal order, we would be confident the court intended no further action in the case." *Id.* at 434. Here, the district court followed our advice and helpfully entered a final judgment. The second prong of the finality test, which "focus[es] on the court's intent," *id.*, is therefore met.

The first prong of the test, which is separate from the district court's intent, is whether there has been a "full adjudication of the issues." *Id.* at 433. Here, there has been a full adjudication of the issue whether Plaintiff must exhaust tribal court remedies. Unless and until Plaintiff exhausts her tribal court remedies, there is nothing further for the district court to do.

Defendants counter that there are more issues before the district court than just exhaustion of tribal court remedies. They correctly point out that, *if* Plaintiff exhausts her tribal court remedies and returns to district court, there *will be* other issues on which the district court must rule (i.e., the merits of whether the tribal court has jurisdiction). According to Defendants, those issues remain before the district court now and the order dismissing the action without prejudice is therefore not final.

We reject Defendants' strained understanding of the issues before the district court. First, those additional issues *may* eventually come before the district court, but that is far from certain. It cannot be said that the district court will necessarily have to rule on them (for instance, the tribal appellate court could hold that it lacks jurisdiction or the parties could settle their dispute). Second, those issues are plainly not before the district court *at the present time*. Having dismissed the action, the district court is powerless to rule on the issues that might eventually come before it if a new action is filed in the future. Third, as discussed above, the Supreme Court has directed that appellate courts give a practical construction to the finality requirement. That guidance undermines Defendants' technical argument. We therefore turn to the merits of this appeal.

B. *Exhaustion of Tribal Court Remedies*

"Non-Indians may bring a federal common law cause of action under 28 U.S.C. § 1331 to challenge tribal court jurisdiction." *Boozer,* 381 F.3d at 934 (citing *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians,* 471 U.S. 845, 850-53, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985)). But a plaintiff must first exhaust tribal court remedies. *See, e.g., Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 19, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987); *Nat'l Farmers,* 471 U.S. at 856-57, 105 S.Ct. 2447; *see also Atwood v. Fort Peck Tribal Court Assiniboine,* 513 F.3d 943, 948 (9th Cir.2008) (applying the doctrine).

Plaintiff acknowledges the doctrine generally but argues that it does not apply for two reasons. First, she argues that she already exhausted her tribal court remedies. In the alternative, she argues that she need not exhaust tribal court remedies because of an exception to the doctrine.

1. *Full Exhaustion of Tribal Court Remedies*

Plaintiff argues that she exhausted her tribal court remedies because she sought – and received – a ruling by the tribal trial court on jurisdiction and because she sought a ruling by the tribal appellate court. Plaintiff argues that exhaustion is complete notwithstanding the fact that the tribal appellate court has not yet ruled on the merits of the jurisdictional issue because it lacks authority to accept interlocutory appeals.

This issue is controlled by *Iowa Mutual*. The relevant facts were identical: "Although the Blackfeet Tribal Code establishes a Court of Appeals, see ch. 11, § 1, it does not allow interlocutory appeals from jurisdictional rulings. Accordingly, appellate review of the Tribal Court's jurisdiction can occur only after a decision on the merits." 480 U.S. at 12, 107 S.Ct. 971. The Court in *Iowa Mutual* held that

> [t]he federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts. At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts. In this case, the Tribal Court has made an initial determination that it has jurisdiction over the insurance dispute, but Iowa Mutual has not yet obtained appellate review, as provided by the Tribal Code, ch. 1, § 5. Until appellate review is complete, the Blackfeet Tribal Courts have not had a full opportunity to evaluate the claim and federal courts should not intervene.

Id. at 16-17, 107 S.Ct. 971.

Plaintiff makes policy arguments as to why the *Iowa Mutual* rule should be different, but she does not, and cannot, cite a case standing for the proposition

that the *Iowa Mutual* rule has been overruled.[4] We therefore hold that Plaintiff has not exhausted her tribal court remedies.

2. *Exceptions to Exhaustion of Tribal Court Remedies*

The Supreme Court has outlined four exceptions to the exhaustion rule: (1) when an assertion of tribal court jurisdiction is "motivated by a desire to harass or is conducted in bad faith"; (2) when the tribal court action is "patently violative of express jurisdictional prohibitions"; (3) when "exhaustion would be futile because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction"; and (4) when it is "plain" that tribal court jurisdiction is lacking, so that the exhaustion requirement "would serve no purpose other than delay." *Nevada v. Hicks*, 533 U.S. 353, 369, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001) (internal quotation marks omitted).

Plaintiff makes brief arguments concerning the first three exceptions, none of which is persuasive.

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[4] This court recently held that, if the tribal appellate court has a *discretionary* interlocutory appeals process, that is sufficient for purposes of exhaustion. *See Ford Motor Co. v. Todecheene*, 488 F.3d 1215, 1217 (9th Cir.2007) (order) ("Ford will be deemed to have exhausted its tribal remedies once the Navajo Nation Supreme Court either resolves the jurisdictional issue or denies a petition for discretionary interlocutory review. . . ."). That holding has no effect on the situation here, because *Iowa Mutual* controls where the tribal court system lacks *any* jurisdiction over interlocutory appeals.

The district court correctly held that there is no evidence of bad faith or harassment in the record. Plaintiff has failed to identify – and the record does not reveal – any "express jurisdictional prohibition[ ]" against tribal court jurisdiction. And, as discussed above, Plaintiff will have an adequate opportunity to challenge the tribal court's jurisdiction in the tribal appellate court; she simply must wait until trial is complete. Exhaustion therefore is not "futile."

We focus on the fourth exception: whether it is "plain" that the tribal court lacks jurisdiction. If "jurisdiction is 'colorable' or 'plausible,'" then the exception does not apply and exhaustion of tribal court remedies is required. *Atwood,* 513 F.3d at 948.

In their unique relationship with the United States, Indian tribes retain a certain amount of "inherent sovereign power." *Montana v. United States,* 450 U.S. 544, 565, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981). But the Supreme Court has "[s]tress[ed] that Indian tribes cannot exercise power inconsistent with their diminished status as sovereigns." *Id.* For example, tribes cannot exercise their inherent *criminal* jurisdiction over nonmembers. *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 212, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978), *superseded by statute on other grounds as stated in United States v. Lara,* 541 U.S. 193, 205-07, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004). The question is murkier with respect to the exercise of a tribe's inherent *civil* jurisdiction over nonmembers. Where, as here, the nonmember is a defendant in the tribal court action, "whether tribal

courts may exercise jurisdiction over a nonmember defendant may turn on how the claims are related to tribal lands." *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1132 (9th Cir.2006) (en banc).

We begin our analysis with *Montana*, "the path-marking case concerning tribal civil authority over nonmembers." *Strate v. A-1 Contractors*, 520 U.S. 438, 445, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997). In *Montana*, the Supreme Court addressed whether a tribe may regulate hunting and fishing by nonmembers on reservation lands owned in fee by nonmembers ("fee lands"). 450 U.S. at 557, 101 S.Ct. 1245. The Court held that civil regulation of nonmembers on fee lands is governed by "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* at 565, 101 S.Ct. 1245. But it described two exceptions to that general rule:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the

> political integrity, the economic security, or the health or welfare of the tribe.

Id. at 565-66, 101 S.Ct. 1245 (citations omitted).

The Court held that neither exception applied to hunting and fishing regulations concerning fee lands. *Id.* at 566, 101 S.Ct. 1245. But the Court was clear that such regulation is permissible concerning lands belonging to the tribe:

> The Court of Appeals held that the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe . . . and with this holding we can readily agree. We also agree with the Court of Appeals that if the Tribe permits nonmembers to fish or hunt on such lands, it may condition their entry by charging a fee or establishing bag and creel limits.

Id. at 557, 101 S.Ct. 1245 (citation omitted).

Ownership status of the land also played an important role in the Supreme Court's decision in *Strate*. There, the Court held that tribal courts lack jurisdiction over claims against nonmembers arising out of traffic accidents on a state highway that passes through reservation lands. 520 U.S. at 442, 117 S.Ct. 1404. Key to the Court's analysis was its holding that the short stretch of state highway that passed over reservation lands was "equivalent, for nonmember governance purposes, to alienated, non-Indian land." *Id.* at 454, 117 S.Ct. 1404 (footnote omitted). The Court noted "that tribes retain considerable control

over nonmember conduct on tribal land," *id.*, and expressly declined to consider whether tribal courts would have jurisdiction over accidents occurring on a tribal road, *id.* at 442, 117 S.Ct. 1404.

Ownership status of the land is not necessarily dispositive. In *Hicks,* the Supreme Court addressed whether a tribe "can regulate state wardens executing a search warrant for evidence of an off-reservation crime." 533 U.S. at 358, 121 S.Ct. 2304. The Court rejected the argument that the tribe has regulatory jurisdiction over nonmembers on reservation lands owned by the tribe simply because of that ownership status: "[T]he existence of tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers." *Id.* at 360, 121 S.Ct. 2304. The Court held that the same principles underlying the two *Montana* exceptions also applied to civil regulation of nonmembers on lands owned by the tribe. *Id.* The Court then balanced the tribe's interest in regulating activity by state wardens with the state's interest in investigating off-reservation crimes and held that the state's interest outweighed that of the tribe. *Id.* at 361-65, 121 S.Ct. 2304.

In responding to the concurrence's argument that tribal ownership of the land should have played a larger role in the analysis, the majority stated: "[W]e acknowledge that tribal ownership is a factor in the *Montana* analysis, and a factor significant enough that it may sometimes be dispositive. We simply do not find it dispositive in the present case, when weighed against the State's interest in pursuing

off-reservation violations of its laws." *Id.* at 370, 121 S.Ct. 2304 (alteration, citation, and internal quotation marks omitted).

We have held repeatedly that determining the scope of tribal court jurisdiction is not an easy task. *See, e.g., Smith,* 434 F.3d at 1130 ("Sixteen years ago, we observed that '[t]here is no simple test for determining whether tribal court jurisdiction exists.' The statement is no less true today." (alteration in original) (quoting *Stock W., Inc. v. Confederated Tribes of the Colville Reservation,* 873 F.2d 1221, 1228 (9th Cir.1989))). Here, however, we need not make a definitive determination of whether tribal court jurisdiction exists; we must decide only whether jurisdiction is plausible. *Atwood,* 513 F.3d at 948. We conclude that tribal court jurisdiction is plausible here.

The tribe seeks to enforce its regulations that prohibit, among other things, trespassing onto tribal lands, setting a fire without a permit on tribal lands, and destroying natural resources on tribal lands. The Supreme Court has strongly suggested that a tribe may regulate nonmembers' conduct on tribal lands to the extent that the tribe can "'assert a landowner's right to occupy and exclude.'" *Hicks,* 533 U.S. at 359, 121 S.Ct. 2304 (quoting *Strate,* 520 U.S. at 456, 117 S.Ct. 1404). The tribal regulations at issue stem from the tribe's "landowner's right to occupy and exclude." Trespass regulations plainly concern a property owner's right to exclude, and regulations prohibiting destruction of natural resources and requiring a fire

permit are related to an owner's right to occupy. *See Hicks,* 533 U.S. at 359, 121 S.Ct. 2304 (discussing a landowner's right to occupy and exclude); *Strate,* 520 U.S. at 455-56, 117 S.Ct. 1404 (same). Accordingly, the tribe's ownership of the land may be dispositive here. *See Hicks,* 533 U.S. at 370, 121 S.Ct. 2304 ("[T]ribal ownership is a factor in the *Montana* analysis, and a factor significant enough that it may sometimes be dispositive." (alteration and internal quotation marks omitted)); *id.* at 359, 121 S.Ct. 2304 (suggesting strongly that regulations concerning a "landowner's right to occupy and exclude" are permissible against nonmembers).

We reject Plaintiff's argument that the Court's holding in *Hicks* forecloses tribal court jurisdiction. The Court did hold, in *Hicks,* that tribal courts lacked jurisdiction notwithstanding tribal ownership of the land. But the crux of the Court's reasoning was that the state's strong interest in executing its criminal warrants concerning an off-reservation crime outweighed the tribe's interest in regulating the activities of "state wardens." *Id.* at 370, 121 S.Ct. 2304. The Court expressly stated that its "holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law. We leave open the question of tribal-court jurisdiction over nonmember defendants in general." *Id.* at 358 n. 2, 121 S.Ct. 2304. Here, of course, Plaintiff cannot assert any state interest to be balanced against the tribe's strong interest in enforcing its regulations

governing trespass, prevention of forest fires, and preservation of its natural resources.

Furthermore, the tribe makes a compelling argument that the regulations at issue are intended to secure the tribe's political and economic well-being, particularly in light of the result of the alleged violations of those regulations in this very case: the destruction of millions of dollars of the tribe's natural resources. *See Montana,* 450 U.S. at 566, 101 S.Ct. 1245 ("A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."). Accordingly, even if we applied the two *Montana* exceptions without regard to the Supreme Court's instruction that ownership of the land may be dispositive in some cases, we reach the same conclusion: In the circumstances of this case, we cannot say that the tribal court plainly lacks jurisdiction.[5]

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[5] It is an open question whether a tribe's adjudicative authority is equal to its regulatory authority. *Hicks,* 533 U.S. at 358, 121 S.Ct. 2304. It is possible, therefore, that the tribe may have authority to regulate a nonmember's trespass and destruction of natural resources yet lack authority to hale the nonmember into tribal court. That possibility does not affect our conclusion that tribal court jurisdiction is *plausible.* We need not, and do not, resolve the open question whether tribal courts have jurisdiction to the same extent that a tribe may regulate nonmember activity.

CONCLUSION

We are sympathetic to Plaintiff's concerns about defending her actions in an unfamiliar court system. But, because tribal court jurisdiction is plausible, principles of comity require us to give the tribal courts a full opportunity to determine their own jurisdiction in the first instance.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Valinda Jo Elliott, Plaintiff, vs. White Mountain Apache Tribal Court; Honorable John Doe Tribal Judge; and White Mountain Apache Tribe, Defendant.	No. CIV 05-4240-PCT-MHM **ORDER** (Filed Dec. 7, 2006)

Currently before the Court is Defendants White Mountain Apache Tribal Court; Honorable John Doe Tribal Judge; and White Mountain Apache Tribe's ("Defendants") Second Amended Motion to Dismiss. (Dkt.#6). After reviewing the pleadings and conducting oral argument on December 4, 2006, the Court issues the following Order.

I. Background

On December 27, 2005, Plaintiff Valinda Jo Elliott ("Plaintiff") filed the instant Complaint in this Court. (Dkt.#1). Plaintiff's Complaint seeks declaratory and injunctive relief against Defendants. Specifically, Plaintiff seeks to enjoin the prosecution of a civil action against Plaintiff in the White

Mountain Apache Tribal Court and for a declaratory judgment that the Tribal Court may not exercise jurisdiction over Plaintiff. (Dkt.#1, Complaint ("Compl.) ¶1). Plaintiff is named in the Tribal Court complaint for her alleged role in contributing and/or causing a fire that caused substantial damage to the land within the territory and boundary of the White Mountain Apache Tribe reservation in the months of June and July 2002. (*Id.* ¶ 9). After being lost in the wilderness for approximately three days, Plaintiff set a signal fire to flag down an overflying helicopter traveling to a nearby fire. (*Id.*). The signal fire worked and the helicopter picked up Plaintiff and flew her to safety. (*Id.*). However, the signal fire spread and continued to burn. The signal fire merged into the nearby burning fire and formed the Rodeo-Chediski fire; one of the State of Arizona's largest fires burning over 400,000 acres of land, including land within the White Mountain Apache Tribal reservation. On June 11, 2003, the White Mountain Apache Tribe instituted a civil action in White Mountain Apache Tribal Court against Plaintiff. The current tribal complaint asserts claims against Plaintiff, a non-Indian and non-member of the White Mountain Apache Tribe, seeking civil penalties including restitution for violations of the White Mountain Apache Tribe government and game and fish codes as well as acts of negligence and trespass. (Defendants' Second Amended Motion to Dismiss, Exhibit A).

Plaintiff challenged the jurisdiction of the White Mountain Apache Tribal Court during the course of litigation in that court. (Compl. ¶ 12). Specifically, Plaintiff filed a motion to dismiss for lack of jurisdiction citing the Supreme Court's ruling in *Montana v. United States,* 450 U.S. 544 (1981). Plaintiff's motion was denied at the Tribal trial court level on December 18, 2003 and the White Mountain Apache Court of Appeals dismissed Plaintiff's appeal on April 12, 2005, finding that it did not possess the requisite jurisdiction to hear the appeal because a final order had not yet been issued in the case. (Defendants' Second Amended Motion to Dismiss, Exhibits B and C). Plaintiff asserted the instant action on December 27, 2005 and on March 20, 2006, Defendants filed their instant Second Amended Motion to Dismiss citing Rules 12(b)(2), 12(b)(4), 12(b)(5) and 12(b)(6) as basis for dismissal. Plaintiff has opposed the Motion and it is fully briefed and ripe for the Court's consideration.[1]

II. Analysis

Defendants move to dismiss Plaintiff's complaint on several grounds invoking Rule 12(b)(6) including (1) Plaintiff did not properly exhaust the requisite tribal remedies prior to bringing the instant action;

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[1] Defendants' basis for dismissal pursuant to Rule 12(b)2), 12(b)(4) and 12(b)(5) is moot as the Parties agree that the issue with service of process has been resolved.

and (2) the Tribal Court clearly has jurisdiction pursuant to the Supreme Court's ruling in *Montana v. United States,* 450 U.S. 544 (1981).

A. Exhaustion of Tribal Remedies

Defendants contend that dismissal, or at the very least a stay, of Plaintiff's Complaint is proper because Plaintiff has not exhausted tribal remedies prior to bringing suit in this Court. This position is in direct contravention to the allegation of Plaintiff's Complaint which states "Plaintiff has exhausted her Tribal remedies and Tribal jurisdiction clearly does not lie under *Montana v. U.S.* Therefore, any further proceedings in Tribal Court are contrary to law." (Compl. ¶15). Support for Defendants' position derives from the Supreme Court's ruling in *National Farmers Union Ins. Cos. v. Crow Tribe,* 471 U.S. 845, 854-57, (1985) which held that "a district court should order a stay, or dismiss the action, notwithstanding the fact it has subject matter jurisdiction over a civil action against a non-Indian, to permit a tribal court to determine in the first instance whether it has the power to exercise subject matter jurisdiction in a civil dispute between Indians and non-Indians that arises on an Indian reservation." *Stock West Corp. v. Taylor,* 964 F.2d 912 (9th Cir. 1992) (en banc). The Supreme Court justified such action in district courts because "an orderly administration of justice in federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is

addressed." *National Farmers,* 471 U.S. at 856. Moreover, Defendants point out that according to the Supreme Court "exhaustion of tribal remedies requires that tribal appellate courts be given the opportunity to review determinations of the lower tribal courts." *Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9, 17 (1987). Defendants further note that to date, only the White Mountain Apache trial court has made a determination on the merits as to jurisdiction over Plaintiff in the White Mountain Apache Tribal Court. (Defendants' Second Amended Motion to Dismiss, Exhibit B). The White Mountain Apache Court of Appeals dismissed Plaintiff's interlocutory type appeal noting that the White Mountain Apache Rules of Appellate Procedure only give the appellate court jurisdiction to hear "final decisions and orders" from tribal court. (Defendants' Second Amended Motion to Dismiss, Exhibits C). As such, the appellate court did not reach the merits and dismissed for lack of jurisdiction. Defendants, therefore, argue that the exhaustion of tribal remedies has not been met. Conversely, Plaintiff argues that a decision on the merits from the White Mountain Apache Court of Appeals is not required under the holding of *Iowa Mutual* and that because the tribe has taken the requisite "'first bite' at the apple" in determining jurisdiction that the tribal remedies requirement has been met. (Plaintiff's Response, pp. 3-4).

The Court finds itself in agreement with Defendants on this issue. It is undisputed that the White Mountain Apache Court of Appeals has not

entertained the merits of Plaintiff's appeal regarding her motion for lack of jurisdiction before the Tribal Court. As noted above, the holding in *Iowa Mutual* is clear in that, at the very least, the Tribal appellate courts must be given the opportunity to entertain the merits of the jurisdiction issue before bringing any claim in federal court. Here, no such opportunity was presented as the White Mountain Apache Court of Appeals lacked jurisdiction to review Plaintiff's appeal. In addition, there does not appear to be any type of discretionary type of review that the White Mountain Apache Court of Appeals could have exercised as the Appellate Rules of the White Mountain Apache Tribe apparently do not consider hearing non-final orders, such as Plaintiff's appeal. As such, the appellate court lacked even the opportunity to hear Plaintiff's appeal. Until this appeal is heard, or at least the Tribal appellate court has the opportunity to hear it, this Court finds that the exhaustion requirement has not been met.

While the Court finds that as a general matter, tribal remedies were not exhausted prior to bringing suit in this Court, the inquiry does not stop here. Plaintiff offers several bases justifying the exercise of jurisdiction in this Court even though exhaustion has not been met. For instance, Plaintiff contends that exhaustion is not required where, as here, there is no colorable or plausible claim of jurisdiction. In addition, Plaintiff asserts that the three exceptions to the exhaustion requirement support jurisdiction in this Court.

(1) Appropriateness of Tribal Jurisdiction

As noted by the Ninth Circuit in *Allstate Indem. Co. v. Stump,* 191 F.3d 1071, 1073 (9th Cir. 1999) the Supreme Court has affirmed the exhaustion requirement prior to bringing federal suit unless "it is plain" that the tribal court lacks jurisdiction over the dispute. (citing *Strate v. A-1 Contractors,* 520 U.S. 438, 459 (1997)). Thus, where the tribal court plainly lacks jurisdiction, exhaustion serves no other purpose than delay and is, therefore, unnecessary. *Nevada v. Hicks,* 533 U.S. 353, 356 (2001). In this case, Plaintiff asserts that tribal jurisdiction is clearly lacking, thus excusing any failure to exhaust her tribal remedies prior to bringing suit in this Court. Defendants, on the other hand, take exception to Plaintiff's position and argue that this case falls firmly within the authorization of tribal jurisdiction discussed in the seminal case on tribal jurisdiction over nonmembers of *United States v. Montana,* 450 U.S. 544 (1981).

As recognized by the Ninth Circuit, "[a]nalyis of Indian tribal court jurisdiction begins with *United States v. Montana.*" *Ford Motor Co. v. Todecheene,* 394 F.3d 1170, 1174 (9th Cir. 2005). In *Montana,* the Supreme Court "held that an Indian tribe could not regulate hunting and fishing by non-Indians on non-Indian owned fee land within the reservation." *Id.* The Supreme Court further explained that there are two sources of tribal jurisdiction against nonmembers; either positive by law, by way of statute or treaty, or through the inherent sovereignty of the

tribe. *Montana*, 450 U.S. at 564.[2] The Supreme Court further stated that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* at 565. However, this general principle, applicable to the instant case as the Plaintiff is a non-member defendant in Tribal Court, is subject to two exceptions. The first exception is that a tribe may regulate through taxation, licensing, or other means, "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements." *Id.* at 565. The second exception is that a tribe "may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566. The Ninth Circuit recently spoke to the *Montana* exceptions and grant of jurisdiction over nonmembers in tribal courts in *Smith v. Salish Kootenai College* ("*SKC*), 434 F.3d 1127 (9th Cir. Jan. 10, 2006) (en banc). In SKC, the Ninth Circuit noted that courts generally look to two specific facts when considering tribal court jurisdiction over a nonmember. First, courts look to the party status of the nonmember. *Id.* at 1131. In other

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[2] In the instant case, there is no argument that tribal jurisdiction is appropriate based upon statute or treaty, rather Defendants argue that tribal jurisdiction is appropriate based upon inherent sovereignty of the tribe.

words, whether the nonmember is a plaintiff or defendant in tribal court. Second, courts have considered, perhaps to a lesser extent, whether the events giving rise to the cause of action occurred within the reservation. *Id.;* (citing *Montana*, 450 U.S. at 1132, (stating "[t]o be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians . . . even on non-Indian fee lands.")). The Ninth Circuit further explained that with respect to instances, such as here, where the defendant in Tribal Court is a nonmember, that Ninth Circuit precedent suggests "that whether tribal courts may exercise jurisdiction over a nonmember defendant may turn on how the claims are related to tribal lands." *Id.* at 1132. The Ninth Circuit noted several decisions in which tribal jurisdiction over a nonmember defendant based upon events occurring on the reservation was appropriate. *Id.* (citing *McDonald v. Means*, 309 F.3d 530 (9th Cir. 2002) (cause of action arose out of accident on tribal land; tribal court had jurisdiction); *Allstate Indem.* 191 F.3d 1971 (cause of action arose out of accident on tribal roads, remanded for exhaustion of tribal determination of jurisdiction); and *Stock W. Inc., v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221 (9th Cir. 1989) (contracts with tribe for activities on reservation; tribal court's determination of jurisdiction entitled to comity)). The Ninth Circuit further concluded that the Supreme Court has left open the question of tribal-court jurisdiction over nonmember defendants in general. *Id.* (citing *Hicks*, 533 U.S. at 358 n.2).

In light of the discussion above, this Court is presented with the question of whether "it is plain" that the Tribal Court lacks jurisdiction over the Plaintiff, a nonmember defendant in White Mountain Apache Tribal Court. *See Strate*, 520 U.S. at 459. Defendants argue at length in their Motion that the jurisdiction is proper in Tribal Court based upon the tribe's inherent sovereignty. Based upon the events at issue before the Tribal Court, Defendants cite the second exception of *Montana* in support of tribal jurisdiction; specifically that [Plaintiff's] activities on tribal land have clearly impacted the White Mountain Apache Tribe's political integrity, economic security, health and welfare . . . " (Defendants' Motion, p. 15). In support of the application of the second exception to *Montana*, the Defendants cite the tribe's interest and ownership of the reservation land that was damaged and is at issue before the Tribal Court. Specifically, the fire damage and destruction to the White Mountain Apache land took place entirely on the tribe's trust lands and not on land held in fee simple for nonmembers. Moreover, Defendants cite the tribe's ownership and regulatory authority over this land. Most notably, the timber that was destroyed. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 138 (1980) (stating that "[u]nder federal law, timber on reservation land is owned by the United States for the benefit of the Tribe . . .).[3] The

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[3] The Supreme Court in *White Mountain Apache Tribe* noted that Fort Apache Reservation occupies over 1.6 million acres including 720,000 acres of commercial forest.

Defendants further note that protection of the tribal timber has been further solidified with the Indian Reorganization Act of 1934 ("IRA"). Notably, the purpose of § 6 of the IRA, codified as 25 U.S.C. § 466, is "'to assure a proper and permanent management of the Indian Forest' under modern sustained-yield methods so as to 'assure that the Indian forests will be permanently productive and will yield continuous revenues to the tribes.'" *United States v. Mitchell,* 463 U.S. 206, 221 (1983). In fact, the White Mountain Apache Tribe's constitution provides the tribe with authority "to manage all economic affairs and enterprises of the Tribe including tribal lands, timber, sawmills, . . . " *See* WMAT Constitution, Article IV, § 1(i). Defendants further contend that the inherent sovereignty is buttressed by the tribe's right to exclude nonmembers from its land. *See Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 144 (1982) (stating that "[n]onmembers who lawfully enter tribal lands remain subject to the tribe's power to exclude them," which includes the power to place conditions on entry, on continued presence, or on reservation conduct.). Thus, in light of the tribe's interest and ownership in the land at issue, Defendants contend that jurisdiction is proper as the tribe possesses inherent sovereignty based upon the power to regulate, manage and protect its forest resources and to enforce its laws.

Conversely, Plaintiff maintains that there is no doubt that jurisdiction does not lie before the Tribal Court. Specifically, Plaintiff argues that neither exception of *Montana* applies to this case. Most

notably, with respect to the second exception of *Montana,* Plaintiff argues that Defendants provide no authority suggesting that this exception is appropriate in this case. Rather, Plaintiff contends that Defendants are attempting "to unilaterally expand supreme court case law" (Plaintiff's Response, p. 7) and to permit such jurisdiction would be "a leap beyond reason." (*Id.* p. 10).

The Court does not agree with Plaintiff that it would be a "leap beyond reason" to provide for Tribal Court jurisdiction over Plaintiff. Specifically, the Court finds that, at the very least, there is a debatable question or colorable claim as to the application of the second exception of the *Montana* to this case. The Ninth Circuit's thorough analysis of *Montana* and Ninth Circuit authority in *Ford Motor Co v. Todecheene,* 394 F.3d 1170 (2005) is instructive in this regard. In *Ford Motor,* the Ninth Circuit affirmed the district court's finding in a products liability case involving a car accident on tribal land that tribal defendant, Ford Motor, "was not required to exhaust tribal remedies before challenging tribal court jurisdiction in federal court, because jurisdiction was plainly lacking and exhaustion would serve only to delay the proceedings." *Id.* at 1173. With respect to the second *Montana* exception, the Ninth Circuit held that it provided no basis for tribal jurisdiction. *Id.* at 1181-82. In making this determination; however, the Ninth Circuit addressed the dissent's point that "tribal ownership of the land on which an accident occurs is a 'significant' factor that may 'may

sometimes be dispositive.'" *Id.* at 1182 (emphasis original). The Ninth Circuit noted that "sometimes is not always. And this case is not one of those times when ownership should be considered a dispositive factor in the *Montana* analysis." *Id.* More importantly, for this case's purposes, the Ninth Circuit went on to explain that "[t]here is absolutely nothing in the record to support the premise that the status of the land impacted potential liability in this case. This case does not involve encroachment upon tribal land, damage to tribal land, interference with the use of tribal land, or any other effect upon tribal land that might prove dispositive." *Id.* Finally, in rejecting the dissent's reliance on *McDonald,* a case in which the Ninth Circuit held tribal jurisdiction to be proper over a nonmember, the Ninth Circuit noted that *McDonald* involved a ruling where the nonmember defendant's horse had wandered onto the roads of the reservation, thereby impacting the interest of the tribe in keeping its roadways free from obstruction. No such circumstances existed in *Todecheene. Id.*

Unlike the situation presented in *Todecheene,* this case does involve, heavily, the tribal land. The tribal land at issue, containing timber which the White Mountain Apache Tribe clearly have an interest in, is at the heart of this litigation. Unlike *Todecheene,* this case does involve "damage to tribal land" and the "interference with the use of the tribal land." *Id.* Specifically, a significant portion of the White Mountain Apache Tribe's reservation was burned and damaged by the Rodeo-Chediski fire

which is alleged to be attributable, at least in part, to Plaintiff's actionable conduct. Moreover, the White Mountain Apache Tribe's useage [sic] of such acreage has undoubtedly been impacted. *Todecheene,* provides distinguishing instructive authority that demonstrates that ownership of the land is significantly relevant to this litigation. As such, the Court finds that, at the very least, there is a debatable question or colorable claim as to whether jurisdiction lies in the Tribal Court. The second exception of *Montana* provides tribes with the inherent power to exercise civil authority over nonmembers where the conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." The conduct at issue occurring on the reservation due to the alleged actions of the Plaintiff potentially threatens the economic security of the tribe based upon the interference of the use of the tribe's land and timber and the overall welfare of the tribe as such resources are material to the tribe's stability. As such, it is debatable that the tribe retains jurisdiction to enforce its regulatory authority over the Plaintiff. Because Plaintiff did not exhaust her tribal remedies before coming to this Court, the Court need not go any further in regards to a final determination as to whether jurisdiction is proper before the Tribal Court.

(2) Exceptions to Tribal Exhaustion

In addition to challenging tribal jurisdiction on the basis that it is plainly lacking, Plaintiff also

argues that the three applicable exceptions to tribal exhaustion apply to this case. In *National Farmers,* 471 U.S. 845, 857, n.21 (1985), the Supreme Court noted that exhaustion would not be required where: (1) the assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) where the action is patently violative of express jurisdictional prohibitions; or (3) where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.

With respect to the first exception, Plaintiff argues tribal jurisdiction is motivated by a desire to harass or is in bad faith. Plaintiff relies on the situation involving Mr. Leonard Gregg, a member of the White Mountain Apache Tribe and firefighter who intentionally set fires that led to the Rodeo fire that eventually merged with the Chediski fire. Plaintiff takes issue with the fact that even though Mr. Gregg is an enrolled member of the White Mountain Apache Tribe and intentionally caused the Rodeo fire, he has not been charged civilly or criminally in Tribal Court. Plaintiff uses Mr. Gregg's case to suggest that Plaintiff is being disparately treated and prosecuted for relief that should, at least in part, be directed at Mr. Gregg.

The Court; however, does not find persuasive Plaintiff's reliance on Mr. Gregg's situation. As noted by the Parties, Mr. Gregg was convicted in this District for crimes resulting from his actions causing the Rodeo fire. CR 02-661-PHX-JAT (Dkt.#77). Notably, Mr. Gregg in addition to his one hundred

and twenty (120) month term of imprisonment with the Bureau of Prisons has also been ordered to pay restitution in the amount of $27,882,502. The Court struggles to see how the situation of Mr. Gregg demonstrates or suggests that tribal civil jurisdiction over Plaintiff for actions that resulted in damage to land owned by the White Mountain Apache Tribe is motivated by a desire to harass or is in bad faith. At best, Plaintiff's argument is based upon speculation.

As to the second exception, Plaintiff argues that the holding in *Montana v. United States*, 450 U.S. 544 (1981) and its progeny demonstrates the jurisdiction before the Tribal Court is patently violative of express jurisdictional prohibitions. However, this argument has been addressed above by the Court and in this Court's view, jurisdiction before the Tribal Court is not "patently violative" of jurisdictional prohibitions. Rather, there is a debatable question as to the propriety of jurisdiction over Plaintiff in Tribal Court based upon her actions on the White Mountain Apache Tribe's reservation and resulting damage. Thus, the Court does not find Plaintiff's argument as to the second exhaustion exception persuasive.

Lastly, Plaintiff argues that exhaustion would be futile because of the lack of an adequate opportunity to challenge the Tribal Court's jurisdiction. Again, Plaintiff takes issue with the procedural history of her initial challenge before the trial level Tribal Court, which rejected her jurisdictional challenge and the Tribal appellate court's dismissal of Plaintiff's appeal for lack of jurisdiction. Plaintiff argues that it

would be inequitable to require her to go through the entire case at the trial level and then along with the other issues re-litigate them to the Tribal Court of Appeals. The Court; however, does not find Plaintiff's argument persuasive as it contrary to the Supreme Court's precedent established in *Iowa Mutual,* 480 U.S. at 17. As noted above, the Supreme Court was clear in stating in pertinent part:

> [t]he federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts. At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts.

Id.

In *Iowa Mutual,* the Supreme Court noted that while the tribal court had made an initial determination as to jurisdiction, the insurer defendant in tribal court, had not yet obtained appellate review as provided in the Blackfeet tribal code. Thus, the Supreme Court stated "[u]ntil appellate review is complete, the Blackfeet Tribal Courts have not had a full opportunity to evaluate the claim and federal courts should not intervene." *Id.* The Court finds this language to be clear and provides against Plaintiff's argument. Due to the Rules of Appellate Procedure for the White Mountain Apache Code, it does not appear that the White Mountain Apache Court of Appeals has even had the opportunity to entertain

Plaintiff's appeal as it only has jurisdiction over "final decisions and orders." *See* Rule 2A, White Mountain Apache Rules of Appellate Procedure; (Defendants' Motion, Exhibit C). Moreover, as noted above, there are compelling reasons for the federal courts to allow the tribal court systems the first opportunity to address such issues, including the "orderly administration of justice in federal court . . ." *National Farmers,* 471 U.S. at 855-57. In addition, by allowing the tribal courts a full opportunity to determine jurisdiction it provides the tribal courts with the ability "to rectify any errors it may have made." *Id.* at 856-57. As such, while it is clear that Plaintiff takes exception with the trial Tribal Court's ruling with respect to jurisdiction over Plaintiff; this determination needs to be taken to the Tribal appellate court in accordance with the Tribal appellate rules so that the appellate court can have an opportunity to address the jurisdictional issue. Until that time, Plaintiff's action in this Court is premature.

In sum, the Court finds that Plaintiff has failed to exhaust her tribal remedies prior to bringing the instant suit. In addition, there is a debatable question or colorable claim as to the propriety of jurisdiction over Plaintiff in Tribal Court exemplifying Plaintiff's obligation to exhaust tribal remedies prior to bringing the instant suit. In addition, the Court does not find any applicable exception justifying Plaintiff's failure to exhaust.

B. Future Handling

The final determination this Court must make is whether to dismiss Plaintiff's suit before this Court or to stay the present matter pending a determination from the Tribal Court. *See SAC,* 434 F.3d at 1131, n.1 (stating "[o]rdinarily, so long as there is a 'colorable question' whether a tribal court has subject matter jurisdiction, federal courts will stay or dismiss an action in federal court 'to permit a tribal court to determine in the first instance whether it has the power to exercise subject-matter jurisdiction in a civil dispute between Indians and non-Indians that arises on an Indian reservation.'") (citations omitted).[4] For instance, in *Stock West,* 964 F.2d at 920, the Ninth Circuit affirmed the district court's decision to dismiss the lawsuit filed by a nonmember corporation as a matter of comity where the tribal court had not yet resolved the questions of tribal sovereignty.[5] Additionally, the Supreme Court has held that whether the matter should be dismissed or stayed is a question reserved for the district court's discretion. *See Nat'l Farmers,* 471 U.S. at 857. In this Court's view, and in the interests of comity, dismissal of the Plaintiff's suit is appropriate. Plaintiff has identified

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[4] Notably, in *SAC,* the Ninth Circuit made clear that the district court did not issue its decision that tribal court had jurisdiction until the plaintiff nonmember had exhausted his appeals in tribal court. *Id.* at 1131, n.1.

[5] The Ninth Circuit subsequently held that the district should have stayed the action based upon the alternative ground for dismissal of sovereign immunity. *Id.*

no prejudice resulting from such determination and can properly challenge jurisdiction once the matter is ripe for federal district court consideration.

Accordingly,

IT IS HEREBY ORDERED granting Defendants' Second Amended Motion to Dismiss. (Dkt.#6). Plaintiff's action is dismissed without prejudice.

IT IS FURTHER ORDERED that the Clerk enter judgment accordingly.

DATED this 6th day of December, 2006.

/s/ Mary H. Murguia
Mary H. Murguia
United States District Judge

APPENDIX C

IN THE WHITE MOUNTAIN APACHE TRIAL COURT
Whiteriver, Arizona
(928) 338-4720/4390 FAX: 338-1163

WHITE MOUNTAIN APACHE TRIBE,	)	
Plaintiff,	)	Docket No. C-03-97
vs.	)	ORDER TO DISMISS
VALINDA JO ELLIOT [sic],	)	(Filed Dec. 18, 2003)
Defendant.	)	

The above named DEFENDANT, having filed a MOTION TO DISMISS for lack of subject matter and personal jurisdiction, and this court having heard the merits of said motion on December 18, 2003:

The White Mountain Apache Tribe has long asserted and maintained civil jurisdiction over the acts of non-members (Non White Mountain Apaches) occurring on White Mountain Apache Tribal lands. This includes members of other federally recognized Indian tribes. The White Mountain Apache Judicial Code, p.1, clearly establishes that Defendant as a "Non-Indian" who is also a "Non-Member".

> H. **"Member"** means an enrolled member of the White Mountain Apache Tribe.
>
> I. **"Non-Member"** means any person who is not a member.

J. **"Non-Indian"** means a person who is not an Indian.

The U.S. Supreme Court has clearly held that Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) did not control the question of the tribes' civil jurisdiction. In *Iowa Mut. Ins. Co. v. LaPlante*, 107 S.Ct. 971 (1987), in very strong affirmative language the same court stated, "Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty", and furthermore went on to state " . . . Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.

In United States v. Montana, 101 S.Ct. 1245 (1981), the high court states that the tribe must show that one of two factors must exist, for analyzing tribal jurisdiction over non-member actions (civil) occurring on private non-Indian fee lands.

1. A consensual relationship between the non-Indian and the tribe, or

2. Conduct which, "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Tribe."

The plaintiff has clearly demonstrated that the second factor involving "conduct" exists in this instance. The White Mountain Apache Tribes political integrity is clearly associated with the protection of its timber stands, a well-known natural resource

which provides economic security for the health and welfare of the White Mountain Apache Tribe. However, the distinction between Montana and the case at hand is the status of the land "*Nn'dee Bi-Kee Yuh*", where the defendant ignited a fire. There is no private non-Indian fee lands involved in this case, only "*Nn'dee Bi-Kee Yuh*". White Mountain Apache Tribal Constitution, 1993, art. I, Section 1.

Defendant's reliance on the [sic] Nevada v. Hicks wherein the United States Supreme Court held that the Fallon Paiute-Shoshone Tribal court did not have jurisdiction to adjudicate a tribal member's claims against a non-Indian (Nevada police officer) for alleged tortious **conduct** in executing a search warrant for an off-reservation crime. The high court used Montana to determine the scope of tribal court jurisdiction, even though the officer's alleged wrongful **conduct** (emphasis added) occurred on tribal trust lands.

The Hicks case appears applicable, except for the following distinctions which this court finds more equitable.

1. The non-Indian Nevada police officer's conduct occurred under the color of law, defendant Elliot's conduct was in violation of a White Mountain Apache Tribal Law.

2. "*C'hinl-seeh Hoz-unh*" is the White Mountain Apache standard for a personal conduct for any person who enters

> *Nn'dee Bi-Kee Yuh*, regardless of the person's status. Under this Apache belief, personal conduct must conform to the highest degree of mutual respect for where you are going. This includes written and oral traditions which regulate personal conduct going to and from, and while at a particular location within *Nn'dee Bi-Kee Yuh*. This standard is also required of White Mountain Apaches when they leave *Nn'dee Bi-Kee Yuh*, into surrounding jurisdictions. The mutual respect is not diminished and therefore is expected of any person who comes on White Mountain Apache Tribal land.

It is therefore ORDERED that defendant's MOTION TO DISMISS FOR LACK OF SUBJECT MATTER AND PERSONAL JURISDICTION is hereby denied.

SO ORDERED THIS 18th day of December, 2003.

/s/ Durango H. Fall
WMAT Chief Trial
Court Judge
Durango H. Fall

APPENDIX D

THE WHITE MOUNTAIN APACHE
COURT OF APPEALS

P.O. Box 598
Whiteriver, Arizona
(928) 338-4390 Fax: 338-1163

VALINDA JO ELLIOTT, Appellant, vs. WHITE MOUNTAIN APACHE TRIBE, Appellee.	Case No.: WMATCA: C-03-97 ORDER OF DISMISSAL (Filed Apr. 12, 2005)

The Court finds that the Petition for Appeal was timely and accepts jurisdiction to review the Petition. This case presents the question of whether or not a party has the ability to appeal a Trial Court's denial of a Motion to Dismiss for lack of personal and subject matter jurisdiction and have the Court of Appeals review the question of personal and subject matter jurisdiction de novo.

Appellant is a non-Indian being sued in civil court on six (6) counts of alleged violation of the White Mountain Apache Tribe's Game and Fish Code and Natural Resource Code. After being served with the complaint on June 27, 2003, the Appellant filed a Motion to Dismiss arguing that the White Mountain Apache Tribal Court lacked both subject matter jurisdiction over the cause of action and personal

jurisdiction over the Appellant. From the record it appears that the only issue that the parties addressed at the trial court level was the question of "civil jurisdiction over non-Indians". The WMAT filed a Response on September 8, 2003 and Appellant filed a Reply on September 24, 2003. The Trial Court set a hearing for November 24, 2003, which was continued to December 17, 2003. The parties appeared and presented oral argument on the issue of civil personal jurisdiction over non-Indians. The Trial Court issued its written ruling on December 18, 2003, although it does not appear that the parties were provided with the ruling until approximately January 15, 2004. The Appellant mailed her appeal on January 19, 2004.

Appellant is requesting that this Court find that the denial of a Motion to Dismiss is an appealable order under the WMAT Rules of Appellate Procedure and having so found, address the issue of the WMAT's civil personal jurisdiction over the Appellant, a non-Indian. The Appellee argues that the Court of Appeals has no jurisdiction to hear an appeal of an interlocutory ruling of the Trial Court.

Both Appellant and Appellee agree that the White Mountain Apache Rules of Appellate Procedure Civil and Criminal govern the actions of this Court. The Appellant also acknowledges that the Rules do not specifically allow interlocutory appeals with regard to motions to dismiss for lack of jurisdiction. Rather, Appellant argues that the Court *should* have jurisdiction because "Such a motion, and the ability to correct a ruling thereon, involve issues which are

otherwise not able to be addressed by a non-Indian. Any ability to correct the jurisdiction decision of the tribal trial court must be done without delay"

Rule 2 states that the "Court of Appeals review shall consist of consideration and determination of questions of law which arise from Tribal Court *final decisions and orders*" (emphasis added) WMAT Rules of Appellate Procedure. It is clear that only final decisions and orders are appealable to the Court of Appeals. Were this Court to find that it did have jurisdiction to consider an interlocutory appeal it would, in fact, be granting itself additional authority outside that specifically provided in the legislation grant establishing the Court of Appeals. This Court does not have the authority to grant itself that additional jurisdiction.

It should be noted that courts of appeals in other jurisdiction [sic] are also limited to considering "final decisions and orders" of their respective trial courts. It is also important to note that the denial of a Motion to Dismiss, unlike the granting of such a motion, is not the final decision in a case. It is true that in some other jurisdictions the denial of a motion to dismiss, in some special cases, can be heard by the appellate court. However, that is done through some special rule or procedure. For example, in Arizona there is a provision for taking a Special Action to the Court of Appeals. There is no similar procedure provided in the WMAT Rules of Appellate Procedure.

This Court finds that there is no appealable issue presented in this case, as the Trial Court has issued no final decision or order. This Court lacks jurisdiction to consider the denial of the Motion to Dismiss.

Therefore, it is ORDERED dismissing the appeal and returning this matter to the Trial Court for the appropriate proceedings.

Dated this 12 day of April, 2005.

/s/ Violet Lui-Frank
Chief Justice
Violet Lui-Frank

/s/ Gloria Kindig
Associate Justice
Gloria Kindig

/s/ Jack Barker
Associate Justice
Jack Barker

Mailed to: Appellant on ___
Appellee on ___

By: _____
Clerk